A

TAKAKO SAKAO

v.

NG PEK YUEN & ANOR

B

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
ZULKEFLI MAKINUDIN FCJ
GOPAL SRI RAM FCJ
[CIVIL APPEAL NO: 02(f)-20-2009(W)]

C

16 OCTOBER 2009

COMPANY LAW: *Corporate personality - Corporate veil - Piercing of - Circumstances when corporate veil may be pierced*

D

CONTRACT: *Privity of contract - Trusts - Whether trusts an exception to the common law rule of privity of contract*

E

CIVIL PROCEDURE: *Appeal - Fact, findings of - Concurrent findings of fact by trial and intermediate appellate court - Whether there was unwarranted deduction based on faulty judicial reasoning from admitted and established facts - Whether miscarriage of justice occasioned - Whether concurrent findings rule of practice ought to apply*

F

CIVIL PROCEDURE: *Trial - Defendant fully conversant with facts but refusing to attend court and give evidence - Consequences of - Whether evidence given by plaintiff ought to be presumed to be true - Whether adverse inference ought to be drawn against defendant - Whether defendant's failure to appear and give evidence at trial discredited defendant's case and strengthened plaintiff's case - Whether trial judge's failure to consider effects of defendant's failure to attend court and give*

G

evidence constituted a misdirection occasioning a miscarriage of justice

H

EQUITY: *Equitable remedies and reliefs - Constructive trust - Tracing - Plaintiff and defendant agreeing to purchase property for business venture - Mutual understanding between plaintiff and defendant that property to be registered in joint names and held in equal shares - Plaintiff contributing towards purchase price - Defendant acquiring and registering property in her sole name and denying plaintiff's right to the property - Whether constructive trust over property created - Whether defendant held property on a constructive trust for the plaintiff - Whether plaintiff entitled to trace her share of the property - Whether equitable for plaintiff to do so*

I

EQUITY: *Equitable remedies and reliefs - Specific performance - Plaintiff and defendant agreeing to purchase property for business venture - Mutual understanding between plaintiff and defendant that property to be registered in joint names and held in equal shares - Defendant acquiring, registering property in her sole name and subsequently selling property to third party - Third party not a bona fide purchaser - Whether constructive trust over property created - Whether agreement may be specifically enforced against third party - Whether doctrine of privity of contract applicable - Specific Relief Act 1950, s. 26(b)*

EQUITY: *Fraud in equity - Elements of - Whether intention to deceive a necessary ingredient in equitable fraud*

EVIDENCE: *Adverse inference - Refusal of defendant to testify on own behalf - Consequences of*

EVIDENCE: *Appeal - Interfering with findings of fact - Concurrent findings of fact by trial and intermediate appellate court - Whether there was unwarranted deduction based on faulty judicial reasoning from admitted and established facts - Whether miscarriage of justice occasioned - Whether concurrent findings rule of practice ought to apply*

EVIDENCE: *Course of trial - Refusal to give evidence - Defendant fully conversant with facts but refusing to attend court and give evidence - Consequences of*

LAND LAW: *Ownership - Restrictions in respect of non-citizens for purchase of property - Constructive trust created over property in favour of non-citizen beneficiary - Whether prior approval of State Authority required - Whether s. 433B of the National Land Code applied to constructive trusts - Whether s. 433B of the National Land Code applied only to express trusts registered under s. 344 of the National Land Code*

PARTNERSHIP: *Duties - Good faith - Mutual understanding between partners to purchase and register property in their joint names - Mutual understanding that property to be held in equal shares - One partner acquiring and registering property in her sole name and denying the other's right to a half share in the property - Whether former partner breaching fiduciary duties owed to the latter partner - Whether former partner guilty of equitable fraud in relation to the latter's interest in the property*

TRUSTS: *Constructive trust - Circumstances when such a trust would arise - Role of equity in constructive trusts - Rights of beneficiaries under a constructive trust*

A ***TRUSTS:*** *Constructive trust - Property - Plaintiff and defendant agreeing to purchase property for business venture - Mutual understanding between plaintiff and defendant that property to be registered in joint names and held in equal shares - Plaintiff contributing towards purchase price - Defendant acquiring and registering property in her sole name and*
B *denying plaintiff's right to the property - Whether constructive trust over property created - Whether defendant held property on a constructive trust for the plaintiff*

TRUSTS: *Resulting trust - Circumstances when such a trust would arise*
C *- Primary function of court where a resulting trust is asserted - Whether court should begin by resorting to presumptions - Whether court should first meticulously examine the facts to objectively ascertain true intention of the parties*

D ***WORDS AND PHRASES:*** *'created in favour of any person or body as "trustee"' - National Land Code, s. 433B - Whether such words referred to constructive trusts - Whether such words referred to express trusts registered under s. 344 of the National Land Code*

The appellant – a Japanese national – and the first respondent
E were partners in the business of a restaurant. They decided to acquire the building in which their restaurant had its business. Both the appellant and the first respondent were to contribute towards the purchase price. The appellant claimed that there was a mutual understanding between her and the first respondent that
F the building, when acquired, was to be purchased and registered in the joint names of herself and the first respondent in equal shares. The appellant subsequently provided a sum of RM194,610 towards the purchase. However, the first respondent purchased the property for RM950,000 and registered it solely in her name.
G Later, the first respondent sold the property to the second respondent – a private limited company – owned by her own husband. The appellant lodged a caveat to protect her interest in the property. The appellant then commenced proceedings to enforce a trust she claimed had arisen in her favour. The appellant
H claimed that she and the first respondent were co-owners and the latter held the appellant's share under a trust. The first respondent did not attend court nor give evidence nor take any part in the case. She merely put forward arguments on why the appellant's caveat ought to be removed. The first respondent instead
I commenced proceedings to remove the appellant's caveat. Both actions were tried together by the High Court which found against

the appellant. It dismissed the appellant's action and directed the removal of her caveat. It also ordered the first respondent to refund the sum of RM65,450, instead of RM194,610, with interest to the appellant. The appellant appealed to the Court of Appeal which affirmed the High Court's orders. Both courts also held that s. 433B of the National Land Code 1965 ('the Code') barred the appellant from enforcing any trust that could have arisen in her favour by reason of her contribution towards the purchase price. The appellant obtained leave to appeal to the Federal Court, which *inter alia* had to determine the following issues: (i) whether the High Court's evaluation of the appellant's evidence was correct, in particular as to the amount of her contribution to the purchase price; (ii) what rights the appellant acquired under the terms of the mutual understanding between her and the first respondent; (iii) whether the appellant could enforce her rights, if any, against the second respondent; and (iv) whether s. 433B of the Code applied to the facts in the instant case.

Held (allowing the appellant's appeal)
Per Gopal Sri Ram FCJ:

(1) Two consequences followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. Firstly, the evidence given by the appellant ought to have been presumed to be true. The judge was under a duty to accept the appellant's evidence as true in the absence of any evidence from the first respondent going the other way. His failure to direct himself in this fashion thereby occasioned a serious miscarriage of justice. Secondly, the court ought to have drawn an adverse inference against the first respondent on the amount of the appellant's contribution to the purchase price as well as the existence and the terms of the mutual understanding or agreement that she had with the first respondent. The trial judge in the present case ought to have held that the failure of the first respondent to give evidence apart from discrediting her case strengthened the appellant's case on those vital points that lay at the axis of the dispute between the parties. Instead, he treated the first respondent's failure to appear and give evidence as a matter of no apparent consequence. His non-direction upon such a crucial point amounted to a misdirection which occasioned a miscarriage of justice. A

reasonable tribunal correctly directing itself on the facts and the relevant law would have held that the appellant had indeed contributed RM194,610 towards the purchase price of the building; that there was a mutual understanding between the appellant and the first respondent that they would be beneficial co-owners of the property in question in equal shares; and that the first respondent had acted in breach of that understanding. *Wasakah Singh v. Bachan Singh* (foll); *Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd* (refd); *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* (foll); *Wisniewski v. Central Manchester Health Authority* (foll); *Herrington v. British Railways Board* (refd); *Crawford v. Financial Institutions Services Ltd (Jamaica)* (foll). (paras 3, 4, 5, 6 & 7)

(2) The instant case was one in which there was an unwarranted deduction based on faulty judicial reasoning from admitted and established facts. Thus, this was an appropriate case to which the concurrent findings rule of practice should not apply. The instant case was one in which so much of the judgment at first instance that was based on facts should not be allowed to stand because it had occasioned a substantial wrong or miscarriage of justice. Both the High Court and the Court of Appeal neglected to apply the true principle of law applicable to the fact pattern in the instant case thereby occasioning a miscarriage of justice. *'The Eurymedon'* (refd); *Onassis and Calogeropoulos v. Vergottis* (foll); *Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy & Ors* (refd). (paras 8, 9 & 10)

(3) In the instant case, the Court of Appeal should have been far more analytical of the facts and the proceedings at first instance. In particular, it had failed to refer to the consequence of the first respondent having studiously refrained from entering the witness box. Indeed, it was the first respondent's bounden duty to have informed the trial court of all the material circumstances peculiarly within her knowledge. The Court of Appeal's judgment was equally flawed as that of the trial judge. (para 11)

(4) The appellant and the first respondent were essentially partners in a business venture. As partners they owed each other a duty to act with utmost good faith towards each other. The mutual understanding that both partners would

purchase in their joint names, with financial contributions from each of them the building which housed their restaurant and hold it in equal shares formed an integral part of their partnership. In breach of her fiduciary duties, the first respondent acquired the property and registered it in her sole name, sold it to the second respondent at a higher price and then denied the appellant's right to a half share in the property. The first respondent was clearly guilty of equitable fraud in relation to appellant's interest in the property. *James Birtchnell v. The Equity Trustees, Executors and Agency Co Ltd* (foll); *Blisset v. Daniel* (refd). (paras 12 & 13)

(5) If a trustee or other fiduciary acquires property in breach of trust or by means of other unconscionable conduct, he or she holds it on a constructive trust for the true beneficiary. In the instant case, the fact pattern of the appellant's case fell squarely within the parameters of a constructive trust. The first respondent did not receive the property in question in her own right. She acquired it pursuant to the mutual arrangement between her and the appellant and with the aid of monies provided by the latter. The circusmstances clearly showed an intention to create a trust from the outset. The appellant's claim – a proprietary and not merely monetary claim – against the first respondent was as a beneficiary under a constructive trust. *Carl Zeiss Stiftung v. Herbert Smith & Co* (foll); *Paragon Finance plc v. DB Thakerar & Co* (foll). (paras 14, 15 & 16)

(6) In the instant case, the trial judge erred when he classified the equitable obligation as a resulting trust. He overlooked the pre-existing fiduciary relationship between the parties and the mutual understanding they had to acquire the property in their joint names in equal shares. (para 17)

(7) The device of a resulting trust was invented by the Court of Chancery to give effect to the implied intention of the parties in relation to the acquisition and disposal of moveable or immoveable property. The primary function of the court in a case where a resulting trust is asserted or a gift is alleged arising from a disposition of property is to determine whether the initial disponor intended to make a gift of the property, movable or immovable, or whether he or she intended the property to be held by the disponee in trust

for some other person or persons, including the disponor or the disponee or both. A court when called upon to decide whether a resulting trust or a gift was intended in given circumstances should not begin by resorting to presumptions. It must meticulously examine the facts to objectively ascertain the true intention of the parties. It is only when there is absent any indication of what was intended by the parties that the court should resort to presumptions. *Westdeutsche Landesbank Girozentrale v. Islington LBC* (foll); *Heng Gek Kiau v. Goh Koon Suan* (foll); *Kyriakides v. Pippas* (foll); *Berry v. British Transport Commission* (foll). (paras 17, 18 & 19)

(8) A constructive trust is imposed by law irrespective of the intention of the parties. It is imposed only in certain circumstances, such as where: (i) there is a specifically enforceable contract for the sale of property (moveable of immovable), the vendor holds the property on a constructive trust for the purchaser; and (ii) a gift made as a donatio mortis causa fails, the intended beneficiary of the gift holds it in trust for the donor. What equity does in those circumstances is to fasten upon the conscience of the holder of the property a trust in favour of another in respect of the whole or a part thereof. *Paragon Finance plc v. DB Thakerar & Co* (foll). *Wong Siew Choong v. Anvest Corporation Sdn Bhd* (refd). (para 20)

(9) The appellant at all material times was entitled to a half share in the trust property as a beneficiary under a constructive trust. She was entitled to claim it from the first respondent and to trace her half share in the property into the hands of anyone who acquired it. However, equity will not assist the victim of a breach of trust to trace trust property where it will be inequitable to do so, for example because the property to be traced has gone into the hands of a *bona fide* acquirer for value or because it has gone into the general funds of a charity. *Re Diplock's Estate* (refd). (para 21)

(10) Indeed, the second respondent was not a *bona fide* purchaser for value. The second respondent company was in substance the alter ego of the first respondent's common law husband. The knowledge of the first respondent was to be attributed to the husband and thence to the second respondent company. The approach adopted by the trial judge was correct both on principle and authority. (para 22)

(11) Where there is fraud, an agency relationship or if the company is a myth or fiction, the doctrine of corporate personality will not insulate the shareholders or directors from being assailed directly. A litigant who seeks the court's intervention to pierce the corporate veil must establish special circumstances showing that the company in question is a mere facade concealing the true facts. Fraud includes equitable fraud. However, an intention to deceive – which is a necessary ingredient in common law fraud – is not an ingredient of equitable fraud, which is essentially unconscionable conduct in circumstances where there exists or is implied or imposed a relationship of trust or confidence. The instant case was a case in which there were special circumstances showing that the second respondent company was a mere facade concealing the true facts. The trial judge was therefore correct in holding the second respondent accountable to the appellant for the trust property. *Salomon v. A Salomon & Co Ltd* (foll); *Woolfson v. Strathclyde Regional Council* (foll); *The Bell Group Ltd (In liquidation) v. Westpac Banking Corporation (No 9)* (foll); *Frame v. Smith* (foll); *Jones v. Lipman* (foll); *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd* (foll). (paras 23, 24, 25, 26 & 27)

(12) In finding that the second respondent was not liable to the appellant because it was not privy to the agreement between the appellant and the first respondent, the Court of Appeal overlooked the trial judge's specific finding that the second respondent was not a *bona fide* purchaser of the trust property. It also overlooked s. 26(b) of the Specific Relief Act 1950, which savings clause did not apply as the second respondent had not acquired the trust property in good faith. The agreement between the appellant and the first respondent was thus even enforceable against the second respondent. The doctrine of privity of contract had nothing to with the fact pattern here. Trusts are an exception to the common law rule of privity of contract. The conscience of the second respondent was clearly tainted with knowledge of the trust. Accordingly, the appellant was entitled to enforce the trust against both the first and second respondents. *Beswick v. Beswick* (refd). (paras 28, 29, 30 & 31)

(13) The words "created in favour of any person or body as trustee'' in s. 433B(1)(c) of the Code refers to an express trust registered in accordance with s. 344 of the Code. Section 433B(1)(c) does not include within its purview constructive trusts which arise by operation of law. Section 433B had no application to the constructive trust imposed upon the first respondent. Section 433B did not also apply to the first respondent as she was not a foreigner. In the instant case, the appellant was not guilty of any equitable misconduct. The appellant was a victim of equitable fraud committed upon her by the first respondent and equity would regard her as a beneficiary under a constructive trust. *Suntoso Jacob v. Kong Miao Ming* (refd). (paras 32, 33 & 34)

Bahasa Malaysia *Translation Of Headnotes*

Perayu – seorang warganegara Jepun – dan responden pertama merupakan pekongsi dalam perniagaan sebuah restoran. Mereka memutuskan untuk memperolehi bangunan dalam mana restoran itu menjalankan perniagaannya. Kedua-dua perayu dan responden pertama akan menyumbang terhadap harga belian. Perayu mendakwa bahawa terdapat suatu persefahaman bersama di antara beliau dan responden pertama bahawa bangunan itu, apabila diperolehi, akan dibeli dan didaftarkan dalam nama-nama bersama beliau dan responden pertama mengikut bahagian-bahagian yang sama. Perayu kemudiannya menyediakan jumlah sebanyak RM194,610 terhadap pembelian. Walau bagaimanapun, responden pertama membeli hartanah itu dengan harga RM950,000 dan mendaftarkannya secara tunggal dalam namanya. Selepas itu, responden pertama menjual hartanah itu kepada responden kedua – sebuah syarikat persendirian berhad – yang dimiliki oleh suaminya. Perayu mengemukakan satu kaveat untuk melindungi kepentingannya dalam hartanah itu. Perayu kemudiannya memulakan prosiding untuk menguatkuasakan suatu amanah yang beliau mendakwa telah berbangkit bagi pihaknya. Perayu mendakwa bahawa beliau dan responden pertama adalah pemilik bersama dan responden telah memegang bahagian perayu di bawah suatu amanah. Responden pertama tidak menghadiri mahkamah ataupun memberi keterangan atau mengambil bahagian dalam kes ini. Beliau hanya mengemukakan hujahan-hujahan mengenai mengapa kaveat perayu seharusnya dibatalkan. Responden pertama sebaliknya memulakan prosiding untuk membatalkan kaveat perayu. Kedua-dua tindakan dibicara bersama oleh Mahkamah Tinggi yang membuat keputusan menentang perayu. Ia menolak tindakan perayu dan

mengarahkan pembatalan kaveatnya. Ia juga mengarahkan responden pertama mengembalikan jumlah sebanyak RM65,450 dan bukan RM194,610, dengan bunga kepada perayu. Perayu merayu ke Mahkamah Rayuan yang mengesahkan arahan-arahan Mahkamah Tinggi. Kedua-dua mahkamah juga mendapati bahawa s. 433B Kanun Tanah Negara ('Kanun') menghalang perayu dari menguatkuasakan apa-apa amanah yang mungkin telah berbangkit bagi pihaknya disebabkan sumbangannnya terhadap harga belian. Perayu mendapat kebenaran untuk merayu ke Mahkamah Persekutuan, yang antara lain terpaksa menentukan isu-isu yang berikut: (i) sama ada penimbangan Mahkamah Tinggi terhadap keterangan perayu adalah betul, terutamanya mengenai amaun sumbangannya terhadap harga belian; (ii) hak apa yang telah diperolehi oleh perayu di bawah terma-terma persefahaman bersama di antara beliau dan responden pertama; (iii) sama ada perayu boleh menguatkuasakan hak-haknya, jika ada, terhadap responden kedua; dan (iv) sama ada s. 433B Kanun terpakai kepada fakta-fakta dalam kes semasa.

Diputuskan (membenarkan rayuan perayu)
Oleh Gopal Sri Ram HMP:

(1) Dua akibat-akibat berikutan apabila responden pertama yang mempunyai pengetahuan tentang semua fakta-fakta enggan memberi keterangan. Pertamanya, keterangan yang diberi oleh perayu sepatutnya dianggap benar. Hakim mempunyai kewajipan untuk menerima keterangan perayu sebagai benar dalam ketiadaan apa-apa keterangan dari responden pertama untuk menentangnya. Kegagalannya untuk mengarahkan dirinya dalam cara ini oleh itu telah menyebabkan suatu salah laksana keadilan yang serius. Keduanya, mahkamah sepatutnya membuat inferens bertentangan terhadap responden pertama atas amaun sumbangan perayu kepada harga belian dan juga kewujudan dan terma-terma persefahaman bersama atau persetujuan bahawa beliau telah membuat dengan responden pertama. Hakim perbicaraan dalam kes kini sepatutnya mendapati bahawa kegagalan responden pertama untuk memberi keterangan selain daripada menimbulkan kesangsian kesnya menguatkan kes perayu atas perkara-perkara penting yang berada di paksi pertikaian di antara pihak-pihak. Sebaliknya, beliau memandang kegagalan responden pertama untuk hadir dan memberi keterangan sebagai suatu perkara yang tidak penting langsung. Ketidakarahan beliau atas suatu perkara yang sebegitu

penting seumpama suatu salah arahan yang telah menyebabkan satu salah laksana keadilan. Sebuah tribunal munasabah yang mengarahkan dirinya dengan betul atas fakta-fakta dan undang-undang yang relevan akan mendapati bahawa perayu telah sememangnya menyumbangkan RM194,610 terhadap harga belian bangunan itu; bahawa terdapat satu persefahaman bersama di antara perayu dan responden pertama bahawa mereka akan menjadi pemilik bersama benefisial hartanah itu mengikut bahagian-bahagian yang sama banyak; dan bahawa responden pertama telah bertindak untuk melanggar persefahaman itu. *Wasakah Singh v. Bachan Singh* (diikuti); *Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd* (dirujuk); *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* (diikuti); *Wisniewski v. Central Manchester Health Authority* (diikuti); *Herrington v. British Railways Board* (dirujuk); *Crawford v. Financial Institutions Services Ltd (Jamaica)* (diikuti).

(2) Kes semasa adalah satu kes di mana terdapat suatu penyimpulan yang tidak wajar berdasarkan penimbangan kehakiman yang salah daripada fakta-fakta yang diakui dan mantap. Oleh itu, ini merupakan kes yang berpatutan di mana dapatan-dapatan bersama amalan tidak sepatutnya dipakai. Kes semasa adalah satu kes di mana terlalu banyak daripada penghakiman instans pertama yang berdasarkan fakta-fakta tidak seharusnya dibenarkan kerana ia telah menyebabkan suatu kesalahan yang amat besar atau suatu salah laksana keadilan. Kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan gagal memakai prinsip undang-undang yang betul kepada corak fakta dalam kes semasa oleh itu mengakibatkan suatu salah laksana keadilan. *'The Eurymedon'* (dirujuk); *Onassis and Calogeropoulos v. Vergottis* (diikuti); *Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy & Ors* (dirujuk).

(3) Dalam kes semasa, Mahkamah Rayuan sepatutnya lebih analitis akan fakta-fakta dan prosiding pada instans pertama. Terutamanya, ia telah gagal merujuk kepada akibat responden pertama yang enggan memasuki petak saksi. Sememangnya, ia merupakan kewajipan responden pertama untuk memberitahu mahkamah perbicaraan tentang semua keadaan material yang beliau ketahui. Penghakiman Mahkamah Rayuan adalah juga sesalah penghakiman hakim perbicaraan.

(4) Perayu dan responden pertama sebenarnya pekongsi dalam sesuatu usaha perniagaan. Sebagai pekongsi mereka mempunyai kewajipan untuk bertindak dengan suci hati terhadap satu sama lain. Persefahaman bersama bahawa kedua-dua pekongsi akan membeli dalam nama-nama mereka bersama, dengan sumbangan kewangan dari mereka berdua terhadap bangunan dalam mana restoran mereka terletak dan memegangnya dalam bahagian yang sama banyak membentuk satu bahagian integral perkongsian mereka. Dengan melanggar kewajipan fidusiarinya, responden pertama memperolehi hartanah itu dan mendaftarkannya dalam nama tunggalnya, menjualnya kepada responden kedua pada harga yang lebih tinggi dan kemudian menafikan hak perayu kepada separuh bahagian hartanah itu. Responden pertama adalah jelas bersalah atas fraud ekuiti berhubung dengan kepentingan perayu dalam hartanah itu. *James Birtchnell v. The Equity Trustees, Executors and Agency Co Ltd* (diikuti); *Blisset v. Daniel* (dirujuk).

(5) Jika seorang pemegang amanah atau fidusiari lain memperolehi hartanah dengan melanggar amanah atau melalui tindakan yang tidak berpatutan langsung, beliau memegangnya atas suatu amanah konstruktif untuk benefisiari yang betul. Dalam kes semasa, corak fakta kes perayu betul-betul termasuk dalam parameter sesuatu amanah konstruktif. Responden pertama tidak menerima hartanah itu bagi haknya sendiri. Beliau memperolehinya melalui persefahaman bersama di antaranya dan perayu dan dengan bantuan duit-duit yang disediakan oleh perayu. Keadaan jelas menunjukkan bahawa ada niat untuk mewujudkan suatu amanah dari permulaan. Tuntunan perayu – suatu tuntutan kepunyaan dan bukan kewangan – terhadap responden pertama adalah sebagai benefisiari di bawah sesuatu amanah konstruktif. *Carl Zeiss Stiftung v. Herbert Smith & Co* (diikuti); *Paragon Finance plc v. DB Thakerar & Co* (diikuti).

(6) Dalam kes semasa, hakim perbicaraan khilaf apabila mengklasifikasikan kewajipan ekuiti sebagai satu amanah berbangkit. Beliau terlepas perhatian akan perhubungan fidusiari yang pra-wujud di antara pihak-pihak dan persefahaman bersama bahawa mereka terpaksa memperolehi hartanah itu dalam nama-nama bersama mereka dalam bahagian-bahagian yang sama.

(7) Alat amanah berbangkit telah dicipta oleh Mahkamah Chancery untuk memberi efek kepada niat tersirat pihak-pihak berhubung dengan perolehan dan pelupusan hartanah yang boleh atau tidak boleh alih. Fungsi primer mahkamah dalam suatu kes di mana amanah berbangkit ditegaskan atau suatu alang dikatakan telah bangkit daripada pelupusan hartanan ialah untuk menentukan sama ada disponor permulaan ingin membuat satu alang hartanah, boleh atau tidak boleh alih, atau sama ada beliau ingin hartanah itu dipegang oleh disponee dalam amanah untuk orang lain, termasuk disponor ataupun disponee atau kedua-duanya. Sebuah mahkamah apabila diminta menentukan sama ada suatu amanah berbangkit atau alang diingini diberi dalam keadaan-keadaan tidak sepatutnya bermula dengan memakai anggapan. Ia mesti mengkaji dengan cermat fakta-fakta untuk menentukan secara objektif niat sebenar pihak-pihak. Ia hanya apabila tidak ada apa-apa indikasi akan apa yang diingini oleh pihak-pihak bahawa mahkamah seharusnya memakai anggapan. *Westdeutsche Landesbank Girozentrale v. Islington LBC* (diikuti); *Heng Gek Kiau v. Goh Koon Suan* (diikuti); *Kyriakides v. Pippas* (diikuti); *Berry v. British Transport Commission* (diikuti).

(8) Sesuatu amanah konstruktif dikenakan oleh undang-undang tidak kira apa niat pihak-pihak. Ia dikenakan hanya dalam keadaan tertentu, seperti di mana: (i) terdapat satu kontrak yang boleh dikuatkuasakan secara spefisik bagi penjualan hartanah (boleh atau tidak boleh alih), penjual memegang hartanah itu atas suatu amanah konstruktif untuk pembeli; dan (ii) suatu alang yang dibuat sebagai donatio mortis causa gagal, benefisiari alang yang diniatkan memegangnya atas amanah untuk donor. Apa ekuiti buat dalam keadaan sebegitu ialah untuk berpegang pada hati nurani pemegang hartanah itu sesuatu amanah bagi pihak seorang lain berkenaan dengan keseluruhan atau sebahagiannya. *Paragon Finance plc v. DB Thakerar & Co* (diikuti). *Wong Siew Choong v. Anvest Corporation Sdn Bhd* (dirujuk).

(9) Perayu pada semua masa material berhak kepada separuh bahagian hartanah amanah itu sebagai benefisiari di bawah amanah konstruktif. Beliau berhak untuk menuntutnya dari responden pertama dan untuk mengesan separuh bahagiannya dalam hartanah itu dalam tangan sesiapun yang telah memperolehinya. Walau bagaimanapun, ekuiti tidak akan

menolong mangsa sesuatu pelanggaran amanah untuk mengesan hartanah amanah di mana ia tidak berekuiti untuk berbuat sedemikian, sebagai contoh kerana hartanah yang dikesan itu telah masuk tangan seorang pembeli *bona fide* atau sebab ia telah masuk dana am sebuah badan amal. *Re Diplock's Estate* (dirujuk). A B

(10) Sememangnya, responden kedua bukan satu pembeli *bona fide*. Responden kedua dalam susbtans merupakan alter ego suami common law responden pertama. Pengetahuan responden pertama diatributkan kepada suaminya dan kemudiannya kepada responden kedua. Pendekatan yang dipakai oleh hakim perbicaraan adalah betul atas kedua-kedua prinsip dan autoriti. C

(11) Di mana ada fraud, satu perhubungan agensi atau jika syarikat itu satu rekaan atau fiksyen, doktrin keperibadian perbadanan tidak akan melindungi pemegang-pemegang syer atau pengarah-pengarah dari diserang secara terus. Seorang litigan yang menuntut mahkamah mencampurtangan untuk menembusi selubung perbadanan mesti membuktikan keadaan-keadaan khas yang menunjukkan bahawa syarikat yang dipersoalkan adalah hanya suatu topeng yang menyembunyikan fakta-fakta sebenar. Fraud termasuk fraud ekuiti. Walau bagaimanapun, suatu niat untuk menipu – yang merupakan ingredien yang perlu dalam fraud common law – bukan satu ingredien fraud ekuiti, yang pada asasnya merupkan kelakuan yang sungguh tidak berpatutan dalam keadaan di mana wujud atau tersirat atau ada satu perhubungan amanah atau keyakinan. Kes semasa adalah satu kes di mana terdapat keadaan-keadaan khas yang menunjukkan bahawa responden kedua ialah hanya satu topeng yang menyembunyikan fakta-fakta sebenar. Hakim perbicaraan oleh itu adalah betul apabila memutuskan bahawa responden kedua bertanggungjawab kepada perayu bagi hartanah amanah itu. *Salomon v. A Salomon & Co Ltd* (diikuti); *Woolfson v. Strathclyde Regional Council* (diikuti); *The Bell Group Ltd (In liquidation) v. Westpac Banking Corporation (No 9)* (diikuti); *Frame v. Smith* (diikuti); *Jones v. Lipman* (diikuti); *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd* (diikuti). D E F G H

(12) Dalam mendapati bahawa responden kedua tidak bertanggungjawab kepada perayu kerana ia bukan privi kepada persetujuan di antara perayu dan responden pertama, I

A Mahkamah Rayuan terlepas perhatian dapatan spesifik hakim perbicaraan bahawa responden kedua bukan satu pembeli *bona fide* hartanah amanah itu. Ia juga terlepas pandang s. 26(b) Akta Relief Spesifik 1950, yang klausa itu tidak terpakai oleh kerana responden kedua tidak memperolehi
B hartanah amanah itu dengan suci hati. Persetujuan di antara perayu dan responden pertama oleh itu boleh juga dikuatkuasakan terhadap responden kedua. Doktrin priviti kontrak tidak mempunyai apa-apa kaitan dengan corak fakta di sini. Amanah merupakan pengecualian kepada kanun
C common law priviti kontrak. Hati nurani responden kedua jelas dicemari dengan pengetahuan amanah itu. Seterusnya, perayu berhak untuk menguatkuasakan amanah itu terhadap kedua-dua responden-responden pertama dan kedua. *Beswick v. Beswick* (dirujuk).

D

(13) Perkataan-perkataan "dicipta bagi pihak seseorang atau suatu badan sebagai pemegang amanah" dalam s. 433B(1)(c) Kanun merujuk kepada suatu amanah nyata yang didaftarkan mengikut s. 344 Kanun. Seksyen 433B(1)(c) tidak termasuk
E dalam lingkungannya amanah-amanah konstruktif yang bangkit menerusi operasi undang-undang. Seksyen 433B tidak terpakai kepada amanah konstruktif yang dikenakan atas responden pertama. Seksyen 433B juga tidak terpakai kepada responden pertama kerana beliau bukan orang asing.
F Dalam kes semasa, perayu tidak bersalah atas apa-apa salahlaku ekuiti. Perayu merupakan mangsa fraud ekuiti yang dilakukan atasnya oleh responden pertama dan ekuiti akan memandangnya sebagai benefisiari di bawah amanah konstruktif. *Suntoso Jacob v. Kong Miao Ming* (dirujuk).

G **Case(s) referred to:**

Berry v. British Transport Commission [1961] 3 All ER 65 ***(foll)***
Beswick v. Beswick [1968] AC 58 ***(refd)***
Blisset v. Daniel [1853] 68 ER 1022 ***(refd)***
Carl Zeiss Stiftung v. Herbert Smith & Co [1969] 2 Ch 276 ***(foll)***
H *Crawford v. Financial Institutions Services Ltd (Jamaica) [2005] UKPC 40* ***(foll)***
Frame v. Smith [1987] 42 DLR (4th) 81 ***(foll)***
Gurbakhsh v. Gurdial AIR [1927] PC 230 ***(refd)***
Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd [1991] 1 CLJ 9; [1991] 1 CLJ (Rep) 155 SC ***(refd)***
I *Heng Gek Kiau v. Goh Koon Suan [2007] 6 CLJ 626 CA* ***(foll)***
Herrington v. British Railways Board [1972] AC 877 ***(refd)***
Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(foll)***

James Birtchnell v. The Equity Trustees, Executors and Agency Co Ltd (1928-30) 42 CLR 384 ***(foll)***
Jones v. Lipman [1962] 1 All ER 442 ***(foll)***
Kyriakides v. Pippas [2004] EWHC 646 (Ch) ***(refd)***
Onassis and Calogeropoulos v. Vergottis [1968] 2 Lloyd's Report 403 ***(foll)***
Paragon Finance plc v. DB Thakerar & Co [1999] 1 All ER 400 ***(foll)***
Re Diplock's Estate [1948] 2 All ER 429 ***(refd)***
Salomon v. A Salomon & Co Ltd [1897] AC 22 ***(foll)***
Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy & Ors [1946] AC 508 ***(refd)***
Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd [1997] 1 CLJ 529 FC ***(foll)***
Suntoso Jacob v. Kong Miao Ming & Anor [1984] 1 LNS 32 ***(refd)***
The Bell Group Ltd (In liquidation) v. Westpac Banking Corporation (No 9) [2008] WASC 239 ***(foll)***
'The Eurymedon' [1942] 73 Lloyd LR 217 ***(refd)***
Wasakah Singh v. Bachan Singh [1931] 1 MC 125 ***(foll)***
Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] AC 669 ***(foll)***
Wisniewski v. Central Manchester Health Authority [1998] PIQR 324 ***(foll)***
Wong Siew Choong Sdn Bhd v. Anvest Corporation Sdn Bhd [2002] 3 CLJ 409 HC ***(refd)***
Woolfson v. Strathclyde Regional Council [1978] SLT 159 ***(foll)***

Legislation referred to:
National Land Code, ss. 344, 433B, 433C
Specific Relief Act 1950, s. 26(b)

Other source(s) referred to:
Sarkar on Evidence, 16th edn, p 1837

For the appellant - Manjit Singh Saini; M/s Harun Idris, Yeoh & Partners
For the 2nd respondent - S Parameswary (K Gheethabai with him); M/s Tay, Tee & Nasir

[Appeal from Court of Appeal, Civil Appeal No: W-02-1236-2005]

[Editor's note: For the Court of Appeal judgment, please see Takako Sakao v. Ng Pek Yuan & Ors And Another Appeal [2009] 5 CLJ 200.]

Reported by Andrew Christopher Simon

JUDGMENT

Gopal Sri Ram FCJ:

[1] The appellant is a Japanese citizen. She brought an action to establish that she was the beneficial owner of a share in a shop-house of which the second respondent, a private limited company is the registered proprietor. She failed before the High

Court. Her appeal to the Court of Appeal was dismissed. She now appeals to us pursuant to the leave granted by this court. The facts have been fully rehearsed by the Court of Appeal in its judgment that is reported in [2009] 5 CLJ 200. We are therefore spared the task of regurgitating them here. Suffice that we state the facts relevant to the issues in this appeal.

[2] The appellant and the first respondent were partners in the business of a restaurant. Sometime in 1992, they decided to acquire the building in which the restaurant had its business. Each of them was to contribute towards the purchase price. In the courts below, the appellant said that she had provided a sum of RM214,610 as her contribution towards the price. That figure was however corrected before us to RM194,610. But the courts below did not accept that this payment had been made. They found for the far lesser sum of RM65,450. They also held that s. 433B of the National Land Code 1965 ("the Code") barred the appellant from enforcing any trust that may have arisen in her favour by reason of her contribution towards the purchase price. We will address these matters later in this judgment. It is the appellant's case that there was an agreement or more appropriately, a mutual understanding, between her and the first respondent that the building, when acquired, was to be purchased and registered in the joint names of herself and the first respondent in equal shares. That did not happen. What however did happen was that the first respondent purchased the property in question on 6 March 1992, for a sum of RM950,000 and had it registered in her sole name. Part of the purchase price had been raised by way of a loan from Perdana Finance Berhad. In mid-1996 the first respondent sold the property to the second respondent company for a sum of RM1,930,000 part of which was raised by way of a loan from Malayan Banking Berhad. In the meantime, the appellant lodged a caveat to protect her interest in the property. She then instituted proceedings to enforce the trust she claimed had arisen in her favour. Proceedings were also commenced by the first respondent for the removal of the appellant's caveat. Both actions were tried together by the High Court which found against the appellant. It dismissed the appellant's action and directed the removal of her caveat. It also ordered the first respondent to refund the sum of RM65,450 with interest to the appellant. The appellant appealed to the Court of Appeal which affirmed the High Court's orders.

[3] Four main points arise in this appeal. First, whether the High Court's evaluation of the appellant's evidence was correct, in particular as to the amount of her contribution to the purchase price. Second, what rights, if any did the appellant acquire under the terms of the mutual understanding between her and the first respondent? Third, whether the appellant may enforce her rights, if any, against the second respondent. And fourth, whether s. 433B of the Code applies to the instant case. Taking the first issue, it is significant that in the present instance the first respondent did not attend court nor give evidence nor take any part in the case. All she did was merely to put forward arguments on why the appellant's caveat ought to be removed. She could have, if she wished, given evidence and challenged the appellant's evidence. But as already noted she refrained from doing that. On the facts of this case, there were two persons who were privy to the terms of the arrangement in question and the details of the payments made and the purpose for which they were made: the appellant and the first respondent. The appellant took the witness stand and gave her evidence on the terms of the arrangement and about the sums of money she had provided and the purpose for which they were provided. No evidence was called on the part of the first respondent to refute the appellant's testimony. Such an important omission was missed by both courts below.

[4] In our judgment, two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. In the first place, the evidence given by the appellant ought to have been presumed to be true. As Elphinstone CJ said in *Wasakah Singh v. Bachan Singh* [1931] 1 MC 125 at p 128:

> If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence. At this stage, the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true.

Now, what the trial judge did in the present case is precisely what he ought not to have done. He expressed dissatisfaction with the appellant's evidence without asking himself that most vital question: does the first defendant/ respondent have a case to

answer? This failure on the part of the trial judge is a serious non-direction amounting to a misdirection which occasioned a miscarriage of justice. The trial judge was at that stage not concerned with his belief of the appellant's evidence. She had given her explanation as to the discrepancies in the figures. And her evidence does not appear to be either inherently incredible or inherently improbable. In these circumstances it was the duty of the judge to have accepted her evidence as true in the absence of any evidence from the first respondent going the other way. He however failed to direct himself in this fashion thereby occasioning a serious miscarriage of justice.

[5] The second consequence is that the court ought to have drawn an adverse inference against the first respondent on the amount of the appellant's contribution to the purchase price as well as the existence and the terms of the mutual understanding or agreement that she had with the first respondent. Where, as here, the first respondent being a party to the action provides no reasons as to why she did not care to give evidence the court will normally draw an adverse inference. See *Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd* [1991] 1 CLJ 9; [1991] 1 CLJ (Rep) 155. See also, *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509 where Peh Swee Chin FCJ said: "The respondents had chosen to close the case at the end of the appellants' case. Although they were entitled to do so, they would be in peril of not having the evidence of their most important witness and of having an adverse inference drawn against them for failing to call such evidence should the circumstances demand it." There are two other authorities that are of assistance on the point. In *Wisniewski v. Central Manchester Health Authority* [1998] PIQR 324, Brooke LJ when delivering the judgment of the Court of Appeal quoted from a number of authorities including the following passage from the speech of Lord Diplock in *Herrington v. British Railways Board* [1972] AC 877:

> The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold.

Brooke LJ then went on to say this:

> From this line of authority I derive the following principles in the context of the present case:
>
> (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

The other case is *Crawford v. Financial Institutions Services Ltd (Jamaica)* [2005] UKPC 40, where Lord Walker of Gestingthorpe when delivering the Advice of the Privy Council said:

> It is well settled that in civil proceedings the court may draw adverse inferences from a defendant's decision not to give or call evidence as to matters within the knowledge of himself or his employees.

[6] *Sarkar on Evidence* 16th edn at p. 1837 states:

> It is the bounden duty of a party personally knowing the whole circumstances to give evidence and to submit to cross-examination. Non-appearance as a witness would be the strongest possible circumstance to discredit the truth of his case *Gurbakhsh v. Gurdial*, A [1927] PC 230.

[7] In the present instance, there is no doubt that the first respondent had intimate knowledge of the material facts relevant to the dispute and that she was privy to the several steps through which the transaction had proceeded. Based on the authorities

already cited, it is patently clear that the trial judge in the present case ought to have held that the failure of the first respondent to give evidence apart from discrediting her case strengthened the appellant's case on those vital points that lay at the axis of the dispute between the parties. This, the trial judge clearly omitted to do. Instead, he treated the first respondent's failure to appear and give evidence as a matter of no apparent consequence. His non-direction upon such a crucial point as this certainly amounts to a misdirection which has occasioned a miscarriage of justice. To conclude the first issue, it is our judgment that there was no judicial appreciation of the appellant's evidence. A reasonable tribunal correctly directing itself on the facts and the relevant law would have held that the appellant had indeed contributed RM194,610 towards the purchase price of the building; that there was a mutual understanding between the appellant and the first respondent that they shall be beneficial co-owners of the property in question in equal shares; and that the first respondent had acted in breach of that understanding.

[8] Learned counsel for the second respondent argued that this being a case in which there are concurrent findings of fact by both courts below, we should not, in accordance with the settled practice of this court, interfere with those findings. The short answer to that submission is that the practice referred to applies to cases where the tribunal of fact at first instance as well as the Court of Appeal have not misdirected themselves. To meet the argument thus advanced, we refer to the speech of Viscount Simon in *'The Eurymedon'* [1942] 73 Lloyd LR 217:

> The appellants, therefore, start in this House under the considerable handicap that there are concurrent findings of fact against them. I am far from saying that in these circumstances the House has no jurisdiction to allow the appeal, but it would need very clear and convincing reasoning to justify us to overthrowing what has already been decided. If it could be shown that the course of events affirmed by the learned judge could not have occurred, that would be an excellent reason for reversing his view – in these mundane happenings there is no more conclusive argument than *non est credendum quia* impossible. If the impeached decision were shown to be unwarranted deduction based on faulty judicial reasoning from admitted or established facts, that might lead to its reversal.

As has been amply demonstrated, the present case is one in which there was an unwarranted deduction based on faulty judicial reasoning from admitted and established facts. Hence this is an appropriate case to which the concurrent findings rule of practice does not apply.

[9] We also approve and apply to the facts of the present instance the observations of Lord Pearce in his dissenting speech in *Onassis and Calogeropoulos v. Vergottis* [1968] 2 Lloyd's Report 403 at p 430:

> The function of a Court of Appeal is to set aside a judgment that should not be allowed to stand because it occasions a substantial wrong or miscarriage of justice. That wrong or miscarriage of justice may consist of a judgment in favour of a wrong party. It may also consist of a failure in the judicial process to which both parties are entitled as of right, namely, the weighing of the respective cases and contentions. Such failure may constitute a wrong or miscarriage of justice even though it may appear that the appellant in the end failed to secure a judgment in his favour: but the fact that the right party seems to have succeeded in the court below will naturally make a Court of Appeal extremely reluctant to interfere, and it would only do so in the rarest cases. Such matters are questions of degree.

In our judgment, the present instance is one in which so much of the judgment at first instance that is based on facts should not be allowed to stand because it has occasioned a substantial wrong or miscarriage of justice.

[10] The last case that we cite in answer to the second respondent's submission on the practice of an apex court in an appeal in which there are concurrent findings is *Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy & Ors* [1946] AC 508. In that case, the Privy Council held that:

> ... in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose

A application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law.

We would observe that the present instance is a case in which both courts below neglected to apply the true principle of law B applicable to the fact pattern here thereby occasioning a miscarriage of justice.

[11] The Court of Appeal did not address its mind in its judgment to any of the points discussed earlier in this judgment. With C respect, its approach should have been far more analytical of the facts and of the proceedings at first instance. In particular, there is, despite a recitation of the line of defence taken by the first respondent, no reference whatsoever to the consequence of her having studiously refrained from entering the witness box. Applying D *Gurbakhsh v. Gurdial* AIR [1927] PC 230, it was her bounden duty to have informed the trial court of all the material circumstances that were peculiarly within her knowledge. The Court of Appeal does not appear to have noticed this aspect of the case at all. With respect, its judgment is, in this respect, E equally flawed as that of the trial judge.

[12] With that we turn now to consider the second issue. The question here is the legal consequence of the mutual understanding between the appellant and the first respondent, including the F payments made by the former to the latter. It is, as we have earlier said, clear from the totality of the circumstances that the appellant and first respondent were essentially partners in a business venture. Here we find it appropriate to quote from the judgment of Dixon J in *James Birtchnell v. The Equity Trustees,* G *Executors and Agency Co Ltd* (1928-30) 42 CLR 384:

> The relationship between partners is, of course, fiduciary. Indeed, it has been said that a stronger case of fiduciary relationship cannot be conceived than that which exists between partners. 'Their mutual confidence is the lifeblood of the concern. H It is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that the business goes on' (per Bacon VC in *Helmore v. Smith* [1890] 15 App Cas 223 at p 225, [1886] 35 Ch D 436 at p 444). The relation is based, in some degree, upon a mutual confidence I that the partners will engage in some particular kind of activity or transaction for the joint advantage only.

[13] As partners the appellant and the first respondent owed each other a duty to act with utmost good faith towards each other. See, *Blisset v. Daniel* [1853] 68 ER 1022. The mutual understanding that both partners would purchase in their joint names, with financial contributions from each of them the building in which the business of their restaurant was being conducted and hold it in equal shares formed an integral part of the partnership. Acting in breach of her fiduciary duties the first respondent acquired the property and had it registered in her sole name. She then sold it to the second respondent at a higher price and proceeded to deny the appellant's right to a half share in it. Given the circumstances of this case, the first respondent was clearly guilty of equitable fraud in relation to appellant's interest in the property in question.

[14] The authorities make it clear that if a trustee or other fiduciary acquires property in breach of trust or by means of other unconscionable conduct, he or she holds it on a constructive trust for the true beneficiary. Traditionally, courts have declined to provide a definition of a constructive trust. As Edmund Davies LJ said in *Carl Zeiss Stiftung v. Herbert Smith & Co* [1969] 2 Ch 276, 300:

> English law provides no clear and all-embracing definition of a constructive trust. Its boundaries have been left perhaps deliberately vague, so as not to restrict the court by technicalities in deciding what the justice of a particular case may demand. But it appears that in this country unjust enrichment or other personal advantage is not a *sine qua non*. Thus in *Nelson v. Larholt* [1948] 1 KB 339, it was not suggested that the defendant was himself one penny better off by changing an executor's cheques; yet, as he ought to have known of the executor's want of authority to draw them, he was held liable to refund the estate, both on the basis that he was a constructive trustee for the beneficiaries and on a claim for money had and received to their use. Nevertheless, the concept of unjust enrichment has its value as providing one example among many of what, for lack of a better phrase, I would call 'want of probity,' a feature which recurs through and seems to connect all those cases drawn to the court's attention where a constructive trust has been held to exist.

[15] In *Paragon Finance plc v. DB Thakerar & Co* [1999] 1 All ER 400, Millett LJ (later Lord Millett) explained the concept of a constructive trust in terms that is difficult to improve:

> A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another. In the first class of case (and this is the class with which we are presently concerned), however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust. Well known examples of such a constructive trust are *McCormick v. Grogan* [1869] 4 App. Cas. 82 (a case of a secret trust) and *Rochefoucald v. Boustead* [1897] 1 Ch. 196 (where the defendant agreed to buy property for the plaintiff but the trust was imperfectly recorded). *Pallant v. Morgan* [1953] Ch. 43 (where the defendant sought to keep for himself property which the plaintiff trusted him to buy for both parties) is another. In these cases the plaintiff does not impugn the transaction by which the defendant obtained control of the property. He alleges that the circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property.

[16] In our considered judgment, the fact pattern of the appellant's case presents no difficulty. It falls squarely within the parameters of a constructive trust. The first respondent did not receive the property in question in her own right. She acquired it pursuant to the mutual arrangement between her and the appellant and with the aid of monies provided by the latter. The cumulative circumstances, in particular the nature of the pre-existing fiduciary relationship and the arrangement to jointly own the property in equal shares, show an intention to create a trust from the outset which the appellant does not impugn. Additionally, there is a strong element of unjust enrichment or lack of probity on the part of the first respondent. The appellant's claim against the first respondent is as a beneficiary under a constructive trust. It is therefore a proprietary claim and not merely monetary, that is to say, for money had and received.

[17] The trial judge largely influenced by the fact that the appellant had contributed towards the purchase of the property classified the equitable obligation here as a resulting trust. In this he fell into error because he completely overlooked the pre-existing fiduciary relationship between the parties and the mutual

understanding they had to acquire the property in their joint names in equal shares. It is perhaps appropriate here to consider the two concepts, namely the resulting trust and the constructive trust. The device of a resulting trust was invented by the Court of Chancery to give effect to the implied intention of parties in relation to the acquisition and disposal of moveable or immovable property. See, *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] AC 669, where Lord Browne-Wilkinson said:

> Under existing law a resulting trust arises in two sets of circumstances: (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a presumption, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer: see *Underhill and Hayton, Law of Trusts and Trustees*, pp. 317 et seq.; *Vandervell v. Inland Revenue Commissioners* [1967] 2 AC 291, 312 et seq.; *In re Vandervell's Trusts (No. 2)* [1974] Ch. 269, 288 et seq. (B) Where A transfers property to B on express trusts, but the trusts declared do not exhaust the whole beneficial interest: *ibid* and *Quistclose Investments Ltd. v. Rolls Razor Ltd (In Liquidation)* [1970] AC 567. Both types of resulting trust are traditionally regarded as examples of trusts giving effect to the common intention of the parties. A resulting trust is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention.

[18] When A purchases Blackacre in B's name, providing, let us say, the whole of the purchase price, equity presumes that the common intention of the parties is for B to hold Blackacre on a trust that results to A. This is referred to as a presumed resulting trust. That a trust should result to A is fair and just because A provided all the money and B provided nothing. But if A is B's husband, parent or guardian or otherwise stands in l*oco parentis* to B, then equity presumes that the common intention of the parties is to make a gift of Blackacre to B. This is referred to as the presumption of advancement. However, as the Court of Appeal pointed out in *Heng Gek Kiau v. Goh Koon Suan* [2007] 6 CLJ 626 the correct approach to cases where a gift is asserted is:

> ... for a court first to determine the true intention of the purchaser. The question whether the purchaser in a particular case had a donative intention is to be determined objectively through a meticulous examination of the facts and evidence of the surrounding circumstances. If after such an examination the court concludes that there was a donative intention on the part of the purchaser that is the end of the matter and there is no room for the operation of the presumption of resulting trust or advancement as the case may be. It is only where there are no or insufficient facts or evidence from which a fair inference of intention may be drawn that a court should turn to presumptions as a last resort to resolve the dispute.

In arriving at this conclusion the Court of Appeal in that case applied with approval the following passage in the judgment of Gabriel Moss QC (sitting as a Deputy High Court judge) in *Kyriakides v. Pippas* [2004] EWHC 646 (Ch) which we also regard as being good law:

> Where there is no declaration (of intention), the court puts itself in the position of a jury and considers all the circumstances of the case, so as to arrive at the purchaser's real intention: Snell para 9-15. It is only where there is no evidence to contradict the presumption that it will prevail: *Ibid.* The case-law has developed in such a way that even 'comparatively slight evidence' will rebut the presumption and a 'less rigid approach should also be adopted to the admissibility of evidence to rebut the presumption of advancement': *Lavelle v. Lavelle* [2004] EWCA Civ 223 (CA) per Lord Phillips MR at para 17.
>
> I suspect the position we have now reached is that the courts will always strive to work out the real intention of the purchaser and will only give effect to the presumptions of resulting trust and advancement where the intention cannot be fathomed and a 'long-stop' or 'default' solution is needed.

[19] In our judgment, the primary function of the court in a case where a resulting trust is asserted or a gift is alleged arising from a disposition of property is clear. It is to determine whether the initial disponor intended to make a gift of the property be it movable or immovable, or whether he or she intended it to be held by the disponee in trust for some other person or persons, including the disponor or the disponee or both. A court when called upon to decide whether a resulting trust or a gift was intended in given circumstances should not begin by resorting to presumptions. It must meticulously examine the facts to objectively

ascertain the true intention of the parties. If the intention of the parties when objectively determined was that the particular property was to be held on a resulting trust then that is the conclusion the court should declare. However, if the intention was that the disponee of the property was to have it as a gift, there can then be no question of a resulting trust being implied. It is only when there is absent any indication of what was intended by the parties that the court should resort to presumptions. Were it otherwise, the court may be arriving at an incorrect conclusion based on a presumption when the evidence points in quite the opposite direction. As Devlin LJ (later Lord Devlin) said in *Berry v. British Transport Commission* [1961] 3 All ER 65, 75:

> ... presumptions of law ought to be used only where their use is strictly necessary for the ends of justice. They are inherently undesirable ... because they prevent the court from ascertaining the truth, which should be the prime object of a judicial investigation, and because, if they are allowed to multiply to excess, the law will become divorced from reality and will live among fantasies of its own.

[20] A constructive trust is imposed by law irrespective of the intention of the parties. And it is imposed only in certain circumstances. Two examples readily available (apart from the facts of this case and those illustrations provided by Millet LJ in *Paragon Finance plc v. DB Thakerar & Co*) are (i) where there is a specifically enforceable contract for the sale of property (moveable of immovable), the vendor holds the property on a constructive trust for the purchaser: see, *Wong Siew Choong Sdn Bhd v. Anvest Corporation Sdn Bhd* [2002] 3 CLJ 409; and (ii) where a gift made as a *donatio mortis causa* fails, the intended beneficiary of the gift holds it in trust for the donor. As may be seen, the vendor in the first illustration and the purportedly dying donor or the beneficiary in the second did not create any trust. Nor did they intend to do so. What equity does in those circumstances is to fasten upon the conscience of the holder of the property a trust in favour of another in respect of the whole or a part thereof.

[21] As earlier observed, we are of the view that the appellant at all material times was entitled to a half share in the trust property as a beneficiary under a constructive trust. She was entitled to claim it from the first respondent and to trace her half share in the property into the hands of anyone who acquired it. But equity will not assist the victim of a breach of trust to trace trust property where it will be inequitable to do so, for example

because the property to be traced has gone into the hands of a *bona fide* acquirer for value or because it has gone into the general funds of a charity (see *Re Diplock's Estate* [1948] 2 All ER 429).

[22] That brings us to the third issue. And that is whether the trust in the appellant's favour may be enforced against the second respondent. We are of the view that it may. There are two reasons. In the first place, as the trial judge correctly held, the second respondent was not a *bona fide* purchaser for value. He found that the second respondent company was in substance the alter ego of the first respondent's common law husband with whom she undoubtedly cohabited. He held, and held correctly, that the knowledge of the first respondent was to be attributed to the husband and thence to the second respondent company. In our judgment, the approach adopted by the trial judge is correct both on principle and authority. As for principle, the starting point is no doubt the doctrine of corporate personality. The general rule is that a company has an existence that is separate and distinct from its shareholders. It finds expression in the seminal case on the subject, *Salomon v. A Salomon & Co Ltd* [1897] AC 22. Lord Halsbury LC there stated the rule thus:

> ... once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.

The Lord Chancellor however provided for cases in which the veil of incorporation may be lifted. He said:

> If there was no fraud and no agency, and if the company was a real one and not a fiction or a myth, every one of the grounds upon which it is sought to support the judgment is disposed of.

The proposition when inverted states that if there is fraud or an agency relationship or if the company is a myth or fiction, the doctrine of corporate personality does not insulate the shareholders or directors from being assailed directly.

[23] A more recent statement of the doctrine of corporate personality is to be found in the case of *Woolfson v. Strathclyde Regional Council* [1978] SLT 159 which is authority for the proposition that a litigant who seeks the court's intervention to

pierce the corporate veil must establish special circumstances showing that the company in question is a mere facade concealing the true facts.

[24] The "fraud" of which Lord Halsbury spoke in *Salomon v. A Salomon & Co Ltd* includes equitable fraud. In the recent Australian case of *The Bell Group Ltd (In liquidation) v. Westpac Banking Corporation (No 9)* [2008] WASC 239; 70 ACSR 1, Owen J discussed the distinction between equitable fraud and fraud at common law. His Honour said:

> 4849. One of the leading Australian texts on equitable principles is R Meagher, D Heydon and M Leeming, Meagher, Gummow and Lehane's Equity Doctrines and Remedies (4th ed 2002). When I refer to this text from time to time in these reasons I will do so by the shortened phrase 'Meagher, Gummow and Lehane'. At [12-050] the authors set out a non-exhaustive list of factual and legal situations that have traditionally been treated as species of equitable fraud. They include:
>
> (a) misrepresentation by persons under an obligation to exercise skill and discharge reliance and trust (for example in fiduciary relationships), and inducements to contract or otherwise for the representee to act to his detriment in reliance on the representation;
>
> (b) the use of power to procure a bargain or gift, resulting in disadvantage to the other party;
>
> (c) conflict of interest against a duty arising from a fiduciary relationship; and
>
> (d) agreements which are *bona fide* between the parties but in fraud of third persons.
>
> 4850. All of these categories can be seen, to varying degrees, in the claims brought by the plaintiffs in the equitable fraud causes of action. The last category is of particular interest because it encompasses the imposition and deceit species referred to as the Earl of Chesterfield fourth limb. I will come to that doctrine shortly.
>
> 22.2.1.2. Equitable fraud and common law fraud compared
>
> 4851. The term common law fraud is often used to describe the tort of deceit, or the making of fraudulent misrepresentations. The tort of deceit is said to encompass

A cases where the defendant knowingly recklessly makes a false statement, with the intention that another will rely on it to his or her detriment.

4852. *Derry v. Peek* [1889] UKHL 1; [1889] 14 App Cas 337 illustrates the principle that honesty is a duty of universal B obligation, existing independently of contract or fiduciary obligations. In *Derry v. Peek*, the House of Lords rejected the argument that a claim of negligence would support an action for fraudulent misrepresentation. In so doing, their Lordships set the standard for common law fraud. Lord C Herschell said, at 374, that to succeed, a plaintiff must prove 'that a false representation has been made (1) knowingly, or (2) without belief in its truth or (3) recklessly, careless whether it be true or false'. In other words, there must be a lack of an honest belief in the truth of the representation. In *Armitage v. Nurse* [1997] D EWCA Civ 1279; [1998] Ch 241; [1997] 3 WLR 1046, Millett LJ discussed the meaning of 'actual fraud' in the context of an exemption clause. At 1053, his Lordship described actual fraud as connoting, at least, 'an intention on the part of the trustee to pursue a particular course E of action, either knowing that it is contrary to the interests of the beneficiaries or being recklessly indifferent whether it is contrary to their interests or not.

4853. This, then, marks out a significant difference between common law fraud and equitable fraud. The latter does F not require proof of an actual intention to deceive.

To summarise, a plea of fraud at common law will not succeed absent proof of an intention to deceive. Such an intention is not an ingredient of equitable fraud which is, essentially speaking, G unconscionable conduct in circumstances where there exists or is implied or imposed a relationship of trust or confidence.

[25] In *Frame v. Smith* [1987] 42 DLR (4th) 81, Wilson J usefully identified some of the principal features of such a relationship. Her ladyship said: H

> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) the fiduciary has scope for the exercise of some discretion or power. I
>
> (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

(3) the beneficiary is peculiarly vulnerable to, or at the mercy of, the fiduciary holding the discretion or power.

Very little need be said about the first characteristic except this, that unless such a discretion or power is present there is no need for a superadded obligation to restrict the damaging use of the discretion or power: see, for example, *RH Deacon & Co Ltd v. Varga, DuDomaine; Third Party* [1972] 30 DLR (3d) 653; affirmed 41 DLR (3d) 767.

With respect to the second characteristic it is, of course, the fact that the power or discretion may be used to affect the beneficiary in a damaging way that makes the imposition of a fiduciary duty necessary. Indeed, fiduciary duties are frequently imposed on those who are capable of affecting not only the legal interests of the beneficiary but also the beneficiary's vital non-legal or 'practical' interests. For example, it is generally conceded that a director is in a fiduciary relationship to the corporation. But the corporation's interest which is protected by the fiduciary duty is not confined to an interest in the property of the corporation but extends to non-legal, practical interests in the financial well-being of the corporation and perhaps to even more intangible practical interests such as the corporation's public image and reputation. Another example is found in cases of undue influence where a fiduciary uses a power over the beneficiary to obtain money at the expense of the beneficiary. The beneficiary's interest in such a case is a pecuniary interest. Finally, in *Reading v. AG* [1951] AC 507 (HL), a British soldier who was unable *(sic)* to smuggle items past Egyptian guards because these guards excused uniformed soldiers from their inspections was held to be a fiduciary. The Crown's interest was a 'practical' or even a 'moral' one, namely that its uniform should not be used in corrupt ways. The soldier-fiduciary had no power to change the legal position of the British Crown, so how could the Crown's legal interests have been affected by the soldier's action? The same can be said of the Crown's interest in *AG v. Goddard* [1929] 98 LJKB 743, where the Crown was able to recover bribes which had been paid to its employee, a sergeant in the metropolitan police. In my view, what was protected in that case was not a 'legal' interest but a vital and substantial 'practical' interest.

The third characteristic of relationships in which a fiduciary duty has been imposed is the element of vulnerability. This vulnerability arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the

> discretion or power. Because of the requirement of vulnerability of the beneficiary at the hands of the fiduciary, fiduciary obligations are seldom present in dealings of experienced businessmen of similar bargaining strength acting at arm's length: see, for example, *Jirna Ltd v. Mister Donut of Canada Ltd* [1971] 22 DLR (3d) 639; affirmed 40 DLR (3d) 303. The law takes the position that such individuals are perfectly capable of agreeing as to the scope of the discretion or power to be exercised, ie, any 'vulnerability' could have been prevented through the more prudent exercise of their bargaining power and the remedies for the wrongful exercise or abuse of that discretion or power, namely damages, are adequate in such a case.

[26] An instance of equitable fraud analogous to the present case is *Jones v. Lipman* [1962] 1 All ER 442. In that case, the first defendant after agreeing to sell his property to the plaintiffs for £5,250 sold and transferred it to a company of which he and his solicitors' clerk were shareholders and directors for £3,000. The plaintiffs sued for and obtained a decree of specific performance against the company of which Russell J (later Lord Russel of Killowen) said:

> The defendant company is the creature of the defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity – an equitable remedy is rightly to be granted directly against the creature in such circumstances.

In *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor* [1997] 1 CLJ 529, Chong Siew Fai (CJ, Sabah & Sarawak) said that in:

> cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the court would disregard the notional separateness of the companies.

His lordship was there, of course, referring to the legal basis upon which judicial intervention has occurred in cases such as *Jones v. Lipman*. And there you have the authority to support the trial judge's approach.

[27] So here. The first respondent sold and transferred trust property to the second respondent which was a device and a sham, a mask which the first respondent's husband held before his face in an attempt to avoid recognition by the eye of equity. Accordingly, this is a case in which there are special circumstances

showing that the second respondent company is a mere facade concealing the true facts. The trial judge was therefore correct in holding the second respondent accountable to the appellant for the trust property.

[28] The second reason is to be found in statute. But before we proceed further, it is convenient at this stage to examine the reason advanced by the Court of Appeal for the appellant's inability to enforce her rights against the second respondent. Here is the relevant passage:

> The appellant's claim is only against the first respondent and not against Glamour Land or even Malayan Banking. Both these latter respondents are strangers to the agreement between the appellant and the first respondent as regards the property. The appellant's two main complaints are that in breach of the agreement between her and the first respondent, the latter had unlawfully registered the property in her sole name. The first respondent had also concealed that fact. And this want of registration of the appellant's name as a co-owner happened despite the request by the first respondent from the appellant for contributions towards the solicitors' fees, compensation payment to the vendor, quit rent, assessment and stamp duty involved in the purchase of the property, which the appellant promptly had contributed to. The above payments were in addition to the appellant's contribution towards the purchase price. The first respondent had represented in writing to the appellant that the property would be 'for our food business' (RR 457-458).
>
> The registration issue apart, the appellant's next serious contention was that, sometime in mid-1996 the first respondent with *mala fide* intent, purportedly sold the property to Glamour Land for the sum of RM1,930,000 in an attempt to defeat her interest. The appellant had alleged that Glamour Land was not a *bona fide* purchaser and had colluded with the first respondent. It was further alleged that the owner of Glamour Land in fact was the husband of the first respondent. Glamour Land was averred to have attempted to create a legal charge on the said property in favour of Malayan Banking in order to defeat the appellant's interest.

[29] The Court of Appeal in the foregoing passage appears to argue that the second respondent is not liable to the appellant because it was not privy to the agreement between the former and the first respondent. This completely overlooks and indeed gives the go-by to the trial judge's specific finding that the second

respondent was not a *bona fide* purchaser of the trust property. It also overlooks s. 26(b) of the Specific Relief Act 1950 which provides:

> Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against:
>
> (a) either party thereto;
>
> (b) any other person claiming under a party to the contract by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract.

The simple answer to the problem contemplated by the Court of Appeal is that the finding by the trial judge that the second respondent had not acquired the trust property in good faith takes the case out of the saving clause in s. 26(b). It follows that the agreement between the appellant and the first respondent was, even as a contract, enforceable against the second respondent company.

[30] There is a further answer. Once it is recognised, as it was by the trial judge and as it ought to have been by the Court of Appeal, that the obligation sought to be enforced was a trust, it would have become apparent that the doctrine of privity of contract had nothing to with the fact pattern here. For it is settled law that trusts are an exception to the common law rule of privity of contract. See, *Beswick v. Beswick* [1968] AC 58.

[31] Based on the facts as found by the trial judge on the issue under discussion, it is crystal clear that the conscience of the second respondent was tainted with knowledge of the trust. Accordingly, the appellant is clearly entitled to enforce the trust against both the first and second respondents.

[32] All that remains to be decided is whether s. 433B of the Code stands in the way of enforcement of the trust established in the appellant's favour. This is the fourth issue. In a gist, the section requires a foreigner – and the appellant is a foreigner – to obtain, by way of an application in writing, the prior approval of the relevant State Authority to "acquire land by way of a disposal under Division II". It also permits, in subsection (1)(c), upon like condition, the transfer or transmission to, or the vesting in, or the creation in favour of any person or body as "trustee", or of two

or more persons or bodies as "trustees", where the trustee or one of the trustees, or where the beneficiary or one of the beneficiaries, is a non-citizen. It was the view of the courts below that the facts of the appellant's case came within the section. As for the trial judge, he held that the trust in the appellant's favour did not come into existence until the first respondent had paid the vendor of the property in question the purchase price in full. As for the Court of Appeal, it appears to have taken the view that the resulting trust in the appellant's favour was "created" when the "moneys were funnelled to the first respondent. The appellant had entrusted her contribution with the first respondent expecting her share and contribution to be used for her benefit in the joint venture. The fact that she was in Japan away from the hub of the business, let alone the fact that the first respondent persuaded her to part with her money, showed that the first respondent was expected to register her as the co-owner of the property in the business venture. The appellant still retained her proprietary rights, whether expressly or by implication, never intending that her beneficial interest be taken away from her and that the interest in the contribution to eventually revert to her on demand." The other finding made by the Court of Appeal is in the following terms: "The appellant failed to obtain the prior written approval of the state authority as required under s. 433B(1) read together with s. 433C of the Code. The appellant was beneficially entitled under the resulting trust over the property acquired by the first respondent but no evidence was adduced that the dealing was prior to 1 January 1993."

[33] With respect, the findings of the trial judge and those of the Court of Appeal suffer from serious errors of principle. Both courts below assumed quite incorrectly that this was a case of a resulting trust. As earlier explained, a resulting trust is one that equity seeks to imply as representing the presumed common intention of the parties in given circumstances. The equitable obligation in the present case ought to have been classified as a constructive trust. At the risk of repetition, and for the reasons earlier provided, a constructive trust is not "created" by individuals. It arises by operation of law.

[34] In our judgment, what s. 433B(1)(c) refers to when it says "created in favour of any person or body as 'trustee'" is an express trust registered in accordance with s. 344 of the Code. It does not include within its purview constructive trusts which arise

by operation of law. Had Parliament intended that result, it would have said so in clear terms. In any event, there is a guide to statutory construction that presumes that Parliament knows the existing law. It knew, when it enacted s. 433B, that a constructive trust is not created by the act of parties; that it is imposed by law, in given circumstances. Accordingly it is our considered view that s. 433B has no application to the constructive trust imposed upon the first respondent. It follows that the courts below erred in the way in which they interpreted the section – without regard to the true nature of the trust that they were dealing with. It also follows that it is irrelevant for present purposes whether the section is prospective or retrospective; whether it came into effect before or after the events occurred in this case that led to the imposition of a constructive trust in the appellant's favour. As for s. 433B(1)(a), this too does not apply because the appellant did not at any time – to quote the words of the section – "acquire land by way of a disposal under Division II" of the Code. What did happen was that as early as 1992, the parties had agreed to acquire the property in question in equal shares. But that never happened. Instead, the first respondent, in breach of her fiduciary duties had the property registered solely in her own name. In other words, the first respondent did "acquire land by way of a disposal under Division II" of the Code. But s. 433B does not apply to her as she is not a foreigner. It was merely a consequence of the first respondent's unlawful acts that a constructive trust was imposed upon her in respect of a one half share in the property. And that is something to which s. 433B does not apply. We would *ex abundanti cautela* add that this is not a case in which the appellant deliberately sought to evade complying with the section by having the property registered in the first respondent's name. She was guilty of no such equitable misconduct. Had she been, the result may well have been different. See, for example, *Suntoso Jacob v. Kong Miao Ming & Anor* [1984] 1 LNS 32 where a resulting trust was defeated on grounds of public policy. This is a case where the appellant as a victim of equitable fraud committed upon her by the first respondent is regarded by equity as a beneficiary under a constructive trust. As we have already said, s. 433B does not apply to constructive trusts.

[35] For the reasons already given, we would allow this appeal and set aside the orders of the courts below. We hereby direct the registrar of this court to fix a date on which we may hear counsel on the terms of the relief that ought to be granted and the appropriate order as to costs, that is to say, whether costs should be awarded on a party-party basis or on a common fund basis or on an indemnity basis. The deposit in court shall be refunded to the appellant.